Rights and Security International's Submission to the Independent Human Rights Act Review

1. Rights and Security International (RSI) is a London-based NGO with over 30 years of experience ensuring that measures taken in the name of national security respect international law, including international human rights law. RSI initially focused on national security in Northern Ireland, before expanding its mandate to the whole of the UK (as Rights Watch (UK)) and now internationally. We have direct and repeated experience of the extraterritorial application of human rights norms – particularly in respect of the Human Rights Act 1998 (HRA) – and we are therefore ideally placed to advise on matters relating to this question in response to the Government's call for evidence.

2. In summary, RSI submits that the HRA has extraterritorial application in at least some circumstances, and that this situation does not impose an unjust or excessive burden on decision-makers that would necessitate change. Extraterritoriality requires the relevant public authority to apply a decision-making process to its actions overseas that is similar to the process it would apply to actions within UK territory, in essence requiring compliance with the HRA. This a sensible approach that requires public authorities to act consistently both in the UK and overseas and ensures that people whose rights have been violated by a public authority's action are able to access justice, regardless of whether an individual resides in the UK or overseas.

3. Moreover, the extraterritorial application of the HRA plays an important role in ensuring that systemic flaws in decision-making processes are remedied, ensuring that public authorities are structured to act in a rights-compliant way.

4. Thus, the Government would risk lowering internal decision-making standards and create a manifest lack of accountability if it amended the HRA to restrict the Act's extraterritorial application.

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK?

5. The HRA incorporates the European Convention on Human Rights (ECHR) into the UK's domestic law. Article 1 of the ECHR states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' set out in the Convention. The European Court of Human Rights (ECtHR) has defined jurisdiction as 'primarily' or 'essentially' territorial.[1] As a result, the general rule is that a State is not responsible under the ECHR for actions taken outside its territory, subject to certain exceptions. The two instances in which the ECHR applies extraterritorially under the Court's current case-law occur when the State exercises 'effective control over an area' (often referred to as the 'territorial model' of control),[2] or when there is 'state agent authority and control' over an individual (often referred to as the 'personal model' of control).[3] The ECHR therefore does not apply extraterritorially in relation to every action of a public authority, but only in these limited circumstances. The paradigmatic example of the territorial model of control is a situation of occupation,[4] but the ECtHR has also found it to apply when a State exercises *de facto* control of a location, which is assessed by referenced to military presence as well as economic and political support.[5] The paradigmatic examples of the personal model of control involve detention[6] or physical control over an individual's movements.[7]

6. RSI submits that, in general, these Court-recognised justifications for extending human rights obligations extraterritorially are logical, based on the public authority's influence over the individual or territory, and have the

[1] *Banković and Others v. Belgium and Others* (App. No. 52207/99), Admissibility, para. 59.
[2] *Al-Skeini and Others v. the United Kingdom* [GC] (App. no. 55721/07), paras. 138-141; *Jaloud v. Netherlands* [GC] (App. no. 47708/08).
[3] *Al-Skeini and Others v. the United Kingdom* [GC] (App. no. 55721/07), paras. 133-137.
[4] Which applied during part of the UK's involvement in Iraq, see *Al-Skeini and Others v. the United Kingdom* [GC] (App. no. 55721/07), paras. 9-23.
[5] *Loizidou v. Turkey (*App. No. 15318/89) (1995) 20 EHRR 99, paras. 16 and 56; 56; *Ilaşcu & Ors v. Moldova and Russia* (App. No. 48787/99) [GC], paras. 387-394; *Al-Skeini and Others v. the United Kingdom* (App. no. 55721/07) [GC], para. 139. For further outline, see Council of Europe, *Guide on Article 1 of the European Convention on Human Rights* (last updated 31 December 2020), pp. 18-19.
[6] *Al-Saadoon and Mufdhi v. the United Kingdom* (App. No. 27021/08), paras. 86-89. [7] *Öcalan v. Turkey* (App. No. 46221/99) [GC], para. 91.

valuable function of encouraging a State to act in a rights-compliant manner in all instances, ensuring protection for individuals as a result. UK officials should not be given licence to act in a manner that violates Convention rights

whilst operating overseas if they would be prohibited from carrying out the same acts within the territory of the UK.[6]

7. The extraterritorial application of the ECHR (and thus the HRA) is not unprecedented. For example, the Human Rights Committee has interpreted the 'jurisdiction' of the International Covenant on Civil and Political Rights ('ICCPR'), to which the UK is a party, as arising where a State exercises either 'power' or 'effective control'[7] — confirming that a State should not be able to perpetrate rights-violating acts abroad with impunity, including when the same acts would be prohibited domestically.[8] 'To conclude otherwise would not only undermine the universality and essence of the rights protected by international human rights law, but may also create structural incentives for States' in outsourcing their practices.[9]

8. Thus, for the UK to modify the HRA so as to restrict or exclude its extraterritorial application would be inconsistent with core principles of international human rights and other international law, as well as the country's specific commitments under the ECHR. Such an approach would position the UK inconsistently with its other European partners, which are also parties to the ECHR, as well as international partners bound by the ICCPR.

What are the implications of the current position?

9. The extraterritorial application of the HRA does not place an undue burden on public authorities acting overseas. As legal scholars have noted,[10] the fact that the HRA applies to the UK's actions overseas does not automatically render such conduct unlawful. Instead, the public authority must simply ensure that it is operating in compliance with its obligations under the HRA and the ECHR, just as it would do were it acting within the territory of the UK. This does not impose any additional unfair burdens on public authorities operating overseas.

10. The extraterritorial application of the HRA has a wholly positive impact on individuals who suffer human rights abuses overseas, but also on the reputation and effective functioning of UK public authorities, including the armed forces. By enabling potential victims of human rights abuses to bring legal claims for alleged rights violations abroad, the HRA ensures that everyone impacted by an authority's potentially rights-violating actions will be eligible to obtain redress. The contrary position, which would limit or restrict the applicability of the HRA outside of UK territory, would have the incongruous outcome that a UK official could commit rights violations overseas when they would be prohibited from doing so within UK borders.[11]

11. The extraterritorial application of the HRA also plays a crucial role in remedying systemic flaws in decision-making and – particularly significant in the case of military action – avoiding of a 'culture of impunity'. In enabling military policy and practice to be scrutinised by an independent body of judges, the HRA helps ensure that flaws in decisionmaking processes are identified and remedied before leading to further rights-violating situations.

12. The prime example of the necessity of this independent oversight is the Baha Mousa Inquiry. The inquiry found that the use of hooding, beating, casual assaults, stress positions and conditioning techniques were

[6] *Issa and Others v. Turkey* (App. No. 31821/96), para. 71.

[7] Human Rights Committee, 'General Comment No. 31: The Nature of General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) CCPR/C/21/Rev.1/Add.13, para. 10.

[8] *López Burgos v Uruguay*, Comm. No. 52/1979 (29 July 1981), CCPR/C/13/D/52/1979, para. 12.3.

[9] For example, in the context of surveillance, see Office of the United Nations High Commissioner for Human Rights, 'The right to privacy in the digital age', A/HRC/27/37 (30 June 2014), para. 33.

[10] Chatham House, 'Beyond the Borders: To What Extent Do States Have Extraterritorial Human Rights Obligations?' (Chatham House Research Event, 13 January 2021), available at: https://www.chathamhouse.org/events/all/research-event/beyond-borders-whatextent-do-states-have-extraterritorial-human-rights?utm_source=Chatham%20House&utm_medium=email&utm_campaign=12134048_ILP%20Winter%20Newsletter&utm_content=Block-Title&dm_i=1S3M,782OW,WMZ1MB,T9Y3M,1

[11] As noted by the ICCPR in *López Burgos v Uruguay*, Comm. No. 52/1979 (29 July 1981), CCPR/C/13/D/52/1979.

extensive.[12]Concerns regarding some of these practices, particularly in relation to hooding, were raised at the time by senior British officers and observers from the International Committee of the Red Cross, however these went unremedied in practice.[15] Moreover, the inquiry concluded that there were systemic issues relating to a lack of discipline, the inadequacy of detention procedures and a failure to adequately assess and respond to detainees'

welfare needs,[13] alongside a lack of clear guidance for soldiers on the ground.[14] The inquiry ultimately led to 73 recommendations, with many relating to policies, practices, instructions, training and other systemic issues.[18] The need for systemic change was subsequently recognised by senior military figures,[15] and ultimately implemented, with long-lasting positive effects on military practice.[16]

13. However, it is unlikely that this inquiry and its beneficial outcome would have taken place without the extraterritorial application of the HRA.[17] It was only after Baha Mousa's family successfully appealed to the House of Lords,[18] relying on the ECHR obligation to carry out an adequate and effective investigation into deaths of those within the UK's jurisdiction, that the inquiry was launched into the circumstances of his death.[19] Without the extraterritorial application of the HRA, there would have been no Baha Mousa Inquiry and, as a result, likely no change in decision-making, policy or training.

14. The HRA has been and will be essential in ensuring that such systemic flaws are remedied; this would not be possible without the extraterritorial application of the HRA.

Is there a case for change?

15. RSI is of the view that the Government should not seek to restrict the extraterritoriality of the HRA. This is because the extraterritorial application of the HRA is essential in ensuring that victims of human rights abuses can access justice, regardless of whether they suffered rights-violating conduct in the UK or overseas. Justice, in turn, promotes peace in the long term.

16. In addition, the extraterritorial application of the HRA improves decision-making by public authorities, including the UK's armed forces, and is a critical contributor to the UK's reputation and standing at the international level.

17. As will be discussed below, some commentators have critiqued the extraterritorial application of the HRA, alleging it imposes overbearing and impractical burdens on public authorities, especially the UK's armed forces.[20] The following discussion will demonstrate that these critiques are unfounded.

Extraterritorial application of the HRA does not create an unjust burden on the UK

18. Although the ECHR (and thus HRA) applies extraterritorially in certain defined circumstances, the ECtHR has found that a mere finding of extraterritorial application does not automatically require the State in question to fulfil every one of the Convention rights vis-a-vis the affected individual. Instead, under the Court's prevailing case-law,

[12] For example, in relation to 1st Battalion The Queen's Lancashire Regiment; see The Rt Hon Sir William Gage, *The Report of the Baha Mousa Inquiry*, HC 1452 (2011) ('Baha Mousa Inquiry'), pp. 1314-1318. [15] Baha Mousa Inquiry, pp. 1340-1342.
[13] Baha Mousa Inquiry, pp. 1315-1318.
[14] For example, in relation to the hooding policy, see Baha Mousa Inquiry, p. 1342.
[18] Baha Mousa Inquiry, pp. 1267-1286.
[15] For example, see BBC News, 'Army pledges change after Baha Mousa inquiry' *(BBC News*, 8 September 2011), available at: https://www.bbc.co.uk/news/av/uk-14847126.
[16] Elizabeth Stubbins Bates, 'The British Army's Training in International Humanitarian Law' (2020) 25(2) Journal of Conflict and Security Law 291.
[17] Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) 16(2) British Journal of Politics & International Relations 211.
[18] *Al-Skeini & Ors v Secretary of State for Defense* [2007] UKHL 26.
[19] Under Article 2 of the ECHR.
[20] For example, see Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat* (*Policy Exchange*, 2015); Richard Ekins and Julie Marionneau, *Lawfare: Resisting the Judicialisation of War* (*Policy Exchange*, 2019); Richard Ekins and John Larkin, *Ten Ways to Improve the Overseas Operations Bill* (*Policy Exchange*, 2021).

the application of the Convention can be 'divided and tailored'.[21] This means that under the current approach, only the degree of protection mandated by the situation is required and the State is therefore not always required to afford protection equivalent to the entirety of the HRA, but only the level of protection that is appropriate in the circumstances. This is a fact-sensitive assessment and requires an analysis of the individual's circumstances as well as the means and powers of control. The protection of rights as 'divided and tailored', in cases concerning control over an individual, therefore limits the degree of human rights protection required of the UK under the Court's interpretation of the ECHR.

19. More broadly, as indicated above, the extraterritorial application of the HRA does not in any case create an unjust burden on public authorities. Rather than providing an additional hurdle or factor to consider in decision-making which may hinder efficiency, the HRA merely requires that the decision-maker consider the human rights implications of their decisions and ensure that their actions comply with the requirements of the HRA. This is not an onerous obligation. Moreover, the requirement applies in a similar manner to conduct within the UK's territory, so the obligation is consistent and predictable.

20. Whilst the extraterritorial application of the HRA does not create an unjust or excessive burden on public authorities when they exercise their decision-making powers, it does ensure that victims of human rights violations are able to access justice. As noted throughout this submission, it would be absurd if action within UK territory were deemed unlawful by virtue of the HRA's operation, while that same conduct outside the UK's borders was regarded as lawful.

21. Without the application of the HRA, there is an increased risk that oppressive and objectively poor decisions will be made. This situation could have negative implications for the UK's standing as a leading figure in the human rights space.

The HRA's application during armed conflict does not unduly restrict the UK's military operations

22. Some commentators have argued that the extraterritorial application of the HRA unduly restricts the UK's armed forces during overseas military operations, as it imposes an unrealistic standard of behaviour on service personnel which does not account for the realities of conflict. Such commentators allege that the HRA was intended to guide State conduct during 'peacetime' and that the rules of international humanitarian law (IHL) are intended to guide State conduct during wartime.[22]

23. In response to this, it is important to note that in the vast majority of situations, the UK's obligations under the ECHR (and thus HRA) and under IHL will be entirely compatible. This is because both sets of laws and norms mostly provide the same limitations on military conduct. For example, the prohibition of torture is a *jus cogens* norm,[23] meaning that it is always binding — without exception.

24. Where there is apparent incompatibility between the ECHR and IHL, the ECtHR has acted flexibly to ensure that both regimes can be upheld. In its case law, the ECtHR's and the UK Supreme Court's approaches have amply accommodated the rules of IHL as a form of *lex specialis*.[24] Thus, the courts have taken the exigencies of conflict situations into consideration, contrary to the aforementioned critiques. Thus, calls for the extraterritorial application of the HRA to be limited on the basis that it undermines the ability of the UK's armed forces to conduct effective military operations are misconceived.

25. Despite claims that the ECHR was intended to guide State actions only during 'peacetime', Article 15 of the ECHR expressly authorises derogation from Convention rights 'in time of war or other public emergency threatening the life of the nation'. This provision would have been unnecessary had the ECHR not been applicable to State conduct

[21] *Al-Skeini and Others v. the United Kingdom* [GC] (App. no. 55721/07), para. 137; *Hirsi Jamaa and Others v. Italy* [GC] (App. No. 27765/09), para. 74.
[22] For example, see Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat* (*Policy Exchange*, 2015), pp. 11-35.
[23] *Prosecutor v. Anto Furundžija,* Trial Chamber, Judgement, IT-95-17/1-T, 10 December 1998, paras. 144, 153-157.
[24] *Hassan v. UK* [GC] (App. no. 29750/09); *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 1.

during an armed conflict. The derogation power would allow the UK, if concerned about its ability to comply with the HRA and ECHR during conflict, to lodge a declaration with the Secretary General of the Council of Europe[25] to this effect.

26. The Convention demonstrates a concern with ensuring that States strictly uphold certain rights at all times, regardless of the circumstances (e.g. armed conflict). States may only derogate from the ECHR 'to the extent strictly required by the exigencies of the situation'; derogations to the right to life may only be made in relation to lawful acts of war; and States may never derogate from the rules prohibiting torture, cruel and inhuman and degrading treatment, slavery and forced labour, or punishment without law.[26] These restrictions on the UK's ability to derogate from Convention rights during armed conflict do not undermine the country's military capabilities, as the restrictions reflect settled international law which — regardless of the context — must not be violated.

27. Critics of the extraterritorial application of the HRA in armed conflict have also alleged that the extraterritorial application of the HRA has led to a proliferation of claims by enemy combatants for non-compliance with the laws of war. This is a misrepresentation: in fact, in the context of armed activities outside the UK's borders, the HRA is typically used by injured civilians and UK military personnel seeking to access justice for rights violations that have occurred as a result of potentially systemic flaws in decision-making.[27] This access to UK courts is essential to vindicate
the rights of both service personnel and civilian victims of human rights abuses.[28] As a result, the extraterritorial application of the HRA serves an important role in facilitating justice — a longstanding UK value and crucial element of long-term peace.

28. Moreover, the removal of human rights protections during conflict carries institutional risks for the UK in its international engagement. Such a change would risk a 'race to the bottom', in which opposition forces likewise fail to moderate their actions in a manner compliant with human rights law[29] — placing British soldiers in danger of reciprocal treatment — while also jeopardising the UK's engagement with international coalition partners in future conflicts and interventions. As Sir General Nick Parker has recently noted,[30] these partners may be less likely engage with the UK if it does not uphold its human rights protections in conflict. The UK should seek to be a leader when applying human rights in armed conflict, and it should therefore leave the extraterritorial application of the HRA in place.

[25] Article 15(3).
[26] Article 15(3).
[27] For example, the *Smith & Ors v. Ministry of Defence* [2013] UKSC 41, referred to consistently as an aspect of the 'lawfare' or 'fog of war' critique (see the Policy Exhange report cited at n26), in fact concerned the ability of British troops to claim against the Ministry of Defence in relation to pre-battlefield decision-making flaws, rather than 'enemy combatants'.
[28] Margaret Spurrier, 'The Human Rights Act protects our soldiers – as well as those they protect' (*The Guardian*, 21 September 2016), available at: https://www.theguardian.com/commentisfree/2016/sep/21/human-rights-act-protects-british-soldiers-bordersbattlefield-mp-tom-tugendhat
[29] International Committee of the Red Cross, 'Global survey reveals strong support for Geneva Conventions but growing indifference to torture' (*ICRC*, 5 December 2016), available at: https://www.icrc.org/en/document/global-survey-reveals-strong-support-genevaconventions-growing-indifference-torture
[30] Helen Warrell, 'Former army chief attacks UK move to limit torture prosecutions' (*Financial Times*, 22 September 2020), available at: https://www.ft.com/content/e68a174d-30c7-49af-be40-b6244f1fcbaf

If you have any further questions, then please do not hesitate to contact Emily Ramsden, RSI's Legal and Policy Officer, at [redacted] or Jacob Smith, Research and Development Officer, at [redacted]